TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1905.

No. ~~[illegible]~~ 9.

J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD CONANT, PATRICK HEALY, RICHARD T. HUME, AND O. M. RUNYON, PLAINTIFFS IN ERROR,

vs.

HENRY O. HARKNESS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED FEBRUARY 27, 1904.

(19,251.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

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J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD CONANT, PATRICK HEALY, RICHARD T. HUME, AND O. M. RUNYON, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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a Record on appeal from second district court of Weber county to supreme court of the State of Utah.

HENRY O. HARKNESS, Plaintiff and Respondent,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, Defendants and Appellants. } No. 1612.

Appearances.

Messrs. Henderson & Macmillan, attorneys for respondent.
Messrs. Heywood and McCormick, attorneys for appellants.

Filed August 12, 1903.

LILBURN P. PALMER,
Clerk Supreme Court, Utah.

1 In the District Court of the Second Judicial District in and for Weber County, Utah.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Defendants.

STATE OF UTAH, } ss:
County of Weber, }

Henry O. Harkness, being first duly sworn deposes and says: That J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healey, R. T. Hume and O. M. Runyon, are now and were at all the times hereinafter set out, directors of the Commercial National Bank of Ogden a corporation organized and existing under and by virtue of the laws of the United States, and that said corporation is doing a banking business in Ogden city, Weber county, State of Utah; that said J. W. Guthrie is president of said corporation; that the said A. R. Heywood is vice-president and general manager of said corporation, and that said Richard T. Hume is assistant cashier of said corporation. That said Commercial national bank is organized with a capital stock of one hundred thousand ($100,000) dollars, divided into one thousand (1000) shares of the par value of one hundred ($100) dollars per share; that affiant is the owner and in possession of one hundred eighty-three and one third (183⅓) shares of the capital
2 stock of said bank, of the par value of eighteen thousand three hundred thirty-three and one-third (18,333⅓) dollars. That

affiant on or about the first day of February, 1903, made a demand upon said directors, and also upon said J. W. Guthrie, as president, A. R. Heywood as vice-president and general manager of said bank, and also upon R. T. Hume, as assistant cashier of said bank for permission to permit affiant to inspect all books, accounts and loans of said bank, and affiant made demand for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank; that each and all of said persons refused permission to affiant to inspect the books, accounts and loans of said bank at any time or at all, and still refuses to permit such inspection.

Affiant further states that he is entitled to the inspection of the books, accounts and loans of said bank for the reason that he is a stockholder of said bank and interested therein. Affiant further states that he seeks this inspection for the purpose of ascertaining the value of his stock in said bank; and affiant further states that he seeks this inspection for the purpose of ascertaining whether the business affairs of said bank have been properly conducted according to law. And affiant further states that loans have been made to a favored few of the patrons of said bank of more than one-tenth of the capital stock to each of said patrons, which is contrary to law. And affiant further states that he believes the said directors and officers of said bank have been guilty of other irregularities, the specific kind of said irregularities your affiant is unable to state at this time and which can only be stated after an inspection of the books, accounts and loans of said bank.

Affiant further states that all of said books, accounts and
3 notes are in the possession and under the control of said J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healey, Richard T. Hume and O. M. Runyon. And affiant further states that he has no plain, speedy and adequate remedy in the ordinary course of law.

Wherefore affiant prays that a writ of mandate may be issued by this court commanding the said J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healey, Richard T. Hume and O. M. Runyon to permit affiant to inspect the books, accounts and loans of the said bank, and affiant will ever pray.

HENRY O. HARKNESS.

Subscribed and sworn to before me this 14th day of April, 1903.

[SEAL.]

A. G. HORN,
Notary Public.

4 In the District Court of the Second Judicial District in and for Weber County, Utah.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Defendants. } Order.

Upon reading the affidavit of Henry O. Harkness, and it appearing from said affidavit of H. O. Harkness, the plaintiff and the party beneficially interested herein, that J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume and O. M. Runyon, are now and were at all times set out in the affidavit of the plaintiff, directors of the Commercial National Bank of Ogden, a corporation organized and existing under and by virtue of the laws of the United States, and that said corporation is doing a banking business in Ogden city, Weber county and State of Utah. That said J. W. Guthrie is president of said corporation; that said A. R. Heywood is vice-president and general manager of said corporation, and that the said R. T. Hume is assistant cashier of said corporation; that said Commercial national bank is organized with a capital stock of one hundred thousand ($100,000) —
5 divided into one thousand (1000) shares of the par value of one hundred (100) dollars, and that plaintiff is the owner of and in possession of one hundred eighty-three and one-third shares of capital stock of said bank, of the par value of eighteen thousand, three hundred thirty-three and one third (18,333⅓) dollars. That on or about the first day of February, 1903, plaintiff did make a demand upon said directors and also upon J. W. Guthrie, as president, A. R. Heywood as vice president and general manager of said bank, and also upon R. T. Hume as assistant cashier of said bank for permission to permit plaintiff to inspect all books, accounts and loans of said bank, and plaintiff did ask for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank, and

Whereas, it also appears that all and each of said persons refused permission to plaintiff to inspect the books, accounts and loans of said bank at any time or at all, and still refuses to permit such inspection,

And whereas plaintiff states that he is entitled to the inspection of the books, accounts and loans of said bank for the reason that he is a stockholder of said bank and interested therein, and that he seeks such inspection for the purpose of ascertaining the value of his stock in said bank and for the purpose of ascertaining whether the business affairs of the said bank have been properly conducted according to law,

And whereas plaintiff further states that the defendants have

made loans to a favored few of the patrons of said bank of more than one tenth of the capital stock to each of said patrons, which is contrary to law, and that plaintiff believes that the directors and officers of said bank have been guilty of other irregularities, the specific kind of which irregularities plaintiff is unable to state, and can only be stated after an inspection of the books, accounts and loans of said bank.

6 And whereas it also appears that all of said books, accounts and notes are in the possession of and under the control of said defendants, and that plaintiff has no plain, speedy and adequate remedy in the ordinary course of law,

It is therefore ordered that an alternative writ of mandate issue out and under the seal of this court directed to the defendants, that immediately after the receipt of this mandate that defendants do permit Henry O. Harkness, the plaintiff, to inspect all the books, accounts and loans of the Commercial National Bank of Ogden, Utah, or that they show cause before this court, at the court room thereof, in Weber county, State of Utah, on the 25th day of April, 1903 at ten o'clock a. m. of that day, why they have not done so.

Done in open court this 14th day of April, A. D. 1903.

HENRY H. ROLAPP, *Judge.*

7 SHERIFF'S OFFICE,
City of Ogden, County of Weber, State of Utah, } ss:

I hereby certify that I served the within alternative writ of mandate by showing the said within original to J. W. Guthrie, R. T. Hume, A. R. Heywood and O. M. Runyon, and delivering a true copy thereof to each of said persons personally, on the 14th day of April, A. D. 1903, in the city of Ogden and State of Utah; and I further certify that I endorsed upon each of said copies the date of said service and signed my official name thereto.

JOSEPH W. BAILEY, *Sheriff,*
By S. H. CAVE, *Deputy.*

8 In the District Court of the Second Judicial District in and for Weber County, Utah.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD CONANT, PATRICK HEALEY, RICHARD T. HUME, and O. M. RUNYON, Defendants.
} Alternative Writ of Mandate.

The State of Utah to J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Greeting:

Whereas, it manifestly appears to me by the affidavit of Henry O. Harkness, the plaintiff and the party beneficially interested herein,

that J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healey, Richard T. Hume and O. M. Runyon, are now and were at all times set out in the affidavit of said plaintiff, directors of the Commercial National Bank of Ogden, a corporation organized and existing under and by virtue of the laws of the United States, and that said corporation is doing a banking business in Ogden city, Weber county, and State of Utah; that said J. W. Guthrie is president of said corporation; that said A. R. Heywood is vice-president and general manager of said corporation, and that R. T. Hume is assistant cashier of said corporation; that said Commercial National Bank is organized with a capital stock of one hundred thousand (100,000) — divided into one thousand (1000) shares of the par value of one hundred (100)
9 dollars, and that plaintiff is the owner of and in possession of one hundred eighty-three and one-third shares of capital stock said bank, of the par value of eighteen thousand, three hundred thirty-three and one-third (18,333⅓) dollars. That on or about the first of February, 1903, plaintiff did make a demand upon said directors and also upon J. W. Guthrie, as president, A. R. Heywood as vice-president and general manager of said bank, and also upon Richard T. Hume as assistant cashier of said bank, for permission to permit plaintiff to inspect all books, accounts and loans of said bank and plaintiff did ask for such inspection at such time or times as would not interfere with the proper conducting of said bank, and

Whereas, it also appears that all and each of said persons refused permission to plaintiff to inspect the books, accounts and loans of said bank at any time or at all, and still refuses to make such inspection,

And whereas plaintiff states that he is entitled to the inspection of the books, accounts and loans of said bank for the reason that he is a stockholder of said bank and interested therein and that he seeks such inspection for the purpose of ascertaining the value of his stock in said bank, and for the purpose of ascertaining whether the business affairs of said bank have been properly conducted according to law.

And whereas plaintiff further states that the defendants have made loans to a favored few of the patrons of said bank of more than one-tenth of the capital stock to each of the patrons, which is contrary to law, and that plaintiff believes that the directors and officers of said bank have been guilty of other irregularities, the specific kind of which irregularities plaintiff is unable to state, and can only be stated after an inspection of the books, accounts and loans of said bank.

10 And whereas it also appears that all of said books, accounts and notes are in the possession of and under the control of said defendants, and that plaintiff has no plain, speedy and adequate remedy in the ordinary course of law,

Now therefore, we do command you that immediately after the receipt of this mandate, that you do permit Henry O. Harkness, the

plaintiff, to inspect all the books, accounts and loans of the Commercial National Bank of Ogden City, Utah, or that you show cause before this court at the court room thereof in Weber county, State of Utah, on the 25th day of April, 1903, at ten (10) o'clock a. m. of that day, why you have not done so.

Witness the Hon. Henry H. Rolapp, judge of the said court at the city of Ogden, Weber county, State of Utah, and the seal of said court this the 14th day of April, A. D. 1903.

[SEAL.] C. R. HOLLINGSWORTH, *Clerk.*

11 In the District Court of the Second Judicial District in and for Weber County, Utah.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, Edward Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Defendants. } Answer.

Come now the defendants in the above entitled matter and answering plaintiff's affidavit and alternative writ of mandate therein, alleges:

1. That this court has no jurisdiction to hear or determine any of the matters complained of by plaintiff, or any issue that could be joined thereby.

2. That the matters complained of by plaintiff do not constitute a cause of action of any kind against these defendants or any of them.

3. That the plaintiff is not entitled to the relief prayed for in his said action, or any relief, and that the court has no jurisdiction to grant the relief which plaintiff seeks.

HEYWOOD AND McCORMICK,
Attorneys for Defendants.

STATE OF UTAH, }
County of Weber, } ss:

J. W. Guthrie, one of the defendants in the above entitled action, on behalf of himself and all other of the defendants in said
12 cause, being first duly sworn says: That he has read the above answer and knows the contents thereof, and that the same is true of his own knowledge except the matters therein stated on information and belief, and that as to those matters he believes it to be true.

J. W. GUTHRIE.

Subscribed and sworn to before me this 22nd day of April, A. D. 1903.

[SEAL.] T. R. O'CONNOLLY,
Notary Public.

13 In the District Court of the Second Judicial District in and for Weber County, State of Utah.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY Conant, Edward Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Defendants.
} Findings of Fact and Conclusions of Law.

This cause came on regularly for hearing on the 29th day of April, 1903, before the court sitting without a jury, Henderson & Macmillan appearing for the plaintiff, and Heywood and McCormick appearing for the defendants. After hearing oral stipulations as to the facts and after the arguments of counsel, now comes the court, and being fully advised in the premises, makes the following findings of fact.

1. That the Commercial National Bank of Ogden, Utah is a corporation organized and existing under and by virtue of the laws of the United States; that said corporation is doing a banking business in Ogden city, Weber county, State of Utah; that the capital stock of said bank is $100,000.00 divided into 1,000 shares of the par value of $100.00 per share.

2. That the defendants are directors and have under their control and in their possession all books, papers, accounts and loans of said Commercial national bank.

3. That there is no acting cashier of said bank, and that there has been no such cashier since the first day of November, 1902; that J. W. Guthrie is president, A. R. Heywood, vice-president, and
14 R. T. Hume is assistant cashier of said bank.

4. That on or about the first day of February, 1903, plaintiff made a demand upon said directors at the banking house of said bank and also upon J. W. Guthrie as president, A. R. Heywood as vice-president and general manager of said bank, and upon R. T. Hume as assistant cashier of said bank for permission to permit plaintiff to inspect all books, accounts and loans of the said bank, and plaintiff made demand for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank.

5. That each and all of said persons refused permission to plaintiff to inspect the said books, accounts and loans of said bank at any time or at all, and they still refuse to permit such inspection.

6. That the plaintiff is the owner and has in his possession 183⅓ shares of the capital stock of said bank of the par value of $18,333.33, and that said stock appears on the stock books of said bank in the name of the said plaintiff.

7. That plaintiff sought and now seeks the inspection of the books accounts and loans of said bank for the purpose of ascertaining the

true financial condition of said bank and also for the purpose of ascertaining the value of his stock in said bank, and also for the purpose of ascertaining whether the business affairs of the said bank have been conducted according to law.

The court further finds that sufficient reason exists for the inspection of said books and accounts of said bank.

As conclusions of law from the foregoing facts the court finds that a peremptory writ of mandate should issue against
15 the defendants and each of them and in favor of the plaintiff for the inspection of all the books, accounts and loans of the said bank and that judgment be entered accordingly.

Dated this 3rd day of June, 1903.

HENRY H. ROLAPP, *Judge.*

16 In the District Court of the Second Judicial District in and for Weber County, State of Utah.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, Edward Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Defendants. } Judgment.

This cause came on regularly for hearing this 29th day of April, 1903, before the court sitting without a jury, the court being fully advised in the premises, and having filed its findings of fact and conclusions of law,

It is therefore ordered, adjudged and decreed that the defendants and each of them do forthwith permit plaintiff to make an inspection of all of the books, accounts and loans of the Commercial National Bank, of Ogden, Utah, and that such inspection be made at such time or times as not to interfere with the proper operation of said bank, and that plaintiff recover his costs herein taxed at $21.80.

Dated Ogden, Utah, June 3, 1903.

HENRY H. ROLAPP, *Judge.*

17 In the District Court of Weber County, State of Utah.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, PATRICK HEALEY, Richard T. Hume, and O. M. Runyon, Defendants.

STATE OF UTAH,
County of Weber, } *ss:*

I, the undersigned, clerk of the district court of the county of Weber, State of Utah, do hereby certify that the foregoing is a true

copy of the judgment rendered in the above entitled action, and recorded in Judgment Book 5 of said court at page 418.

And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action.

Witness my hand and the seal of said court on this 3rd day of June, A. D. 1903.

[SEAL.] C. R. HOLLINGSWORTH, *Clerk.*
By THOMAS B. FARR,
Deputy Clerk,

18 In the District Court of the Second Judicial District of the State of Utah in and for Weber County.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY Conant, Patrick Healey, Richard T. Hume and O. M. Runyon, Defendants. } Bill of Exceptions.

Be it remembered that the above entitled action came regularly on to be heard before the court without a jury, on the 29th day of April, 1903, upon the affidavit and alternative writ of mandate of the plaintiff, who appeared by his attorneys Messrs. Henderson & Macmillan, and the answer thereto of defendants, who appeared by their attorneys Messrs. Heywood & McCormick, and that the following evidence was introduced at the trial.

1. There is at present no cashier of the Commercial National Bank of Ogden, and said bank has been without such officer since November 1st, 1902.

2. That the loans and discounts of the said Commercial National Bank of Ogden, are entered in one of the sub-divisions of the "ledger" of said bank, and that they are in the shape of notes, and are kept separate in a pouch.

3. That the plaintiff Harkness is a stockholder of record on the books of said Commercial National Bank of Ogden.

And this was all of the evidence introduced in the case.

Assignment of Errors.

19 The defendants, and each of them, named in the above entitled cause specify as errors the following:

1. The court erred in assuming jurisdiction to hear try or determine any of the matters complained of by plaintiff, by reason of his alleged cause of action.

2. The court erred in permitting any evidence to be introduced at the hearing of said cause and in rendering judgment therein on behalf of plaintiff, for the reason that the matters complained of by

plaintiff do not constitute a cause of action against the defendants, or any of them.

3. The court erred in granting the plaintiff the relief prayed for in his alleged cause of complaint.

4. The court erred in rendering judgment in favor of the plaintiff and against the defendants, for the reason that said judgment is contrary to law.

6. The court erred in rendering its said judgment for the reason that it is not supported by the evidence.

7. The court erred in making its findings of fact for the reason that the same are not warranted or supported by the evidence.

8. The court erred in making its findings of fact as shown in paragraph 4 of its "findings of fact" and "conclusions of law," for the reason that the facts as found in said paragraph are erroneous, unsupported and unwarranted by any evidence in the case.

9. The court erred in making its conclusions of law for the reason that the same are erroneous, and unsupported by the facts and the evidence.

10. The court erred in entering judgment in this action for the reason that it does not affirmatively appear that the findings of fact and conclusions of law made by the court were or are in writing.

The foregoing draft is hereby submitted on behalf of the defendants as and for the bill of exceptions in the case.

HEYWOOD AND McCORMICK,
Attorneys for Defendants.

STATE OF UTAH, }
County of Weber. }

I, the undersigned judge of the district court of the second judicial district of the State of Utah, in and for the county of Weber, do hereby certify that the foregoing bill of exceptions, contains all of the evidence adduced at the trial of the cause wherein said bill of exceptions is entitled, and I hereby allow, sign, settle and certify the same as and for the bill of exceptions in said action.

Dated July 10, 1903.

HENRY H. ROLAPP, *Judge.*

It is hereby stipulated that the foregoing may be settled as and for the bill of exceptions in said cause, without further notice.

HENDERSON AND MacMILLAN,
Attorneys for Plaintiff.

21 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, Edward Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Defendants. } Notice of Appeal.

To Henry O. Harkness, plaintiff in the above entitled action, his attorneys, Henderson & Macmillan, and the clerk of said district court:

You will please take notice that the defendants in the above entitled action, and each of them, hereby appeal to the supreme court of the State of Utah, from the judgment rendered and entered in the district court of the second judicial district of the State of Utah, sitting in and for the county of Weber, on the 3rd day June, 1903, in favor of the plaintiff in said action, and against the said defendants, and from the whole thereof. Dated this 14th day of July, 1903.

HEYWOOD & McCORMICK,
Attorneys for Defendants.

Service upon us of the foregoing notice of appeal by receipt of copy thereof by us this 14th day of July 1903.

HENDERSON AND MACMILLAN,
Attorneys for Plaintiff.

22 In the District Court of the Second Judicial District of the State of Utah, in and for Weber County.

HENRY O. HARKNESS, Plaintiff,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Defendants.

STATE OF UTAH, *County of Weber,* } ss:

I, C. R. Hollingsworth, clerk of the district court of the second judicial district of the State of Utah, in and for the county of Weber, do hereby certify that the above and foregoing is the original judgment roll in the above entitled action, filed June 3, 1903; the bill of exceptions, filed upon settlement July 10, 1903; and the original notice of appeal, filed July 14, 1903; and that all the foregoing are hereby transmitted to the Supreme Court pursuant to such appeal,

And I do further certify that an undertaking on appeal in due form has been properly filed, the same having been filed on July 14, 1903.

Witness my hand and the seal of said court hereunto affixed this 20th day of July, A. D. 1903.

[SEAL.] C. R. HOLLINGSWORTH, *Clerk.*

23 In the Supreme Court of the State of Utah.

HENRY O. HARKNESS, Plaintiff and Respondent,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, Edward Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Defendants and Appellants. } Petition in Error.

Come now each of the defendants and appellants above named, and represent unto the court, that the district court of the second judicial district of the State of Utah, sitting within and for the county of Weber, on the 3rd day of June, 1903, made and entered its judgment in favor of the above named plaintiff and respondent, and against the said defendants and appellants, as will appear by the transcript of the record in said cause, to which this petition in error is attached, and which is filed herewith. And defendants and appellants allege and show unto the court that there is manifest error in said record and proceedings in this to-wit:

1. The said district court erred in assuming jurisdiction to hear, try or determine any of the matters and facts complained of by plaintiff and respondent, by reason of his alleged cause of action.

2. The said district court erred in permitting any evidence to be introduced at the hearing of said cause and in rendering and
24 entering judgment therein on behalf of plaintiff and respondent, for the reason that the matters and facts complained of by plaintiff and respondent, as stated in his alleged cause of action, do not constitute a cause of action against the defendants and appellants, or any of them.

3. The said district court erred in granting the plaintiff and respondent the relief prayed for in his alleged cause of complaint.

4. The said district court erred in rendering its judgment in favor of the plaintiff and respondent for the reason that said judgment is contrary to law.

5. The said district court erred in rendering and entering its said judgment for the reason that said judgment is not supported by any evidence.

6. The said district court erred in making its findings of fact and each of them, for the reason that the same are not warranted or supported by any evidence.

7. The said district court erred in making its findings of fact as

shown and set out in paragraph 4, of its findings of fact and conclusions of law, for the reason that the facts as found in said paragraph are erroneous and unsupported and unwarranted in said case.

8. The said district court erred in making its conclusions of law, in said action, for the reason that the same, and each of its conclusions of law are erroneous, and unsupported and unwarranted by the facts, or any of them, and by the evidence, or any of it, in said cause.

9. The said district court erred in making and entering its said judgment in this action, for the reason that it does not affirmatively appear that the findings of fact and conclusions of law made by the court were, or are, in writing.

10. The said district court erred in not granting defendants and appellants judgment upon the pleadings in said cause.

24½ Wherefore, relying upon each and every of the foregoing alleged errors for a reversal of said judgment, defendants and appellants pray, that said judgment may be reversed and that plaintiff's and respondent's action may be dismissed, and for costs, and for such other and further relief as the appellants are entitled to receive, and to the court shall seem meet.

HEYWOOD AND McCORMICK,
Attorneys for Appellants.

25 In the Supreme Court of the State of Utah, Regular October Term, October 27th, 1903.

HENRY O. HARKNESS, Respondent,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, Edward Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon, Appellants. } Submission.

This cause coming on regularly to be heard was argued by Hon. A. R. Heywood, in behalf of appellants; by Hon. H. H. Henderson, in reply, was submitted, and by the court taken under advisement.

Judgment.

Title of Court and Cause.

FEBRUARY 9, 1904.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the lower court, in granting the writ of mandamus be, and the same is hereby affirmed, with costs.

26 In the Supreme Court of the State of Utah.

HENRY O. HARKNESS, Respondent,
v.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, Appellants.

BASKIN, *C. J.:*

On the application of the plaintiff, an alternative writ of mandamus was issued commanding the defendants to permit the plaintiff to inspect all of the books, accounts and loans of the Commercial National Bank of Ogden City, Utah, or show cause on the 25th day of April why they had not done so. On the day mentioned the defendants appeared, and in answer to plaintiff's affidavit and the alternative writ, alleged:

"1. That this court has no jurisdiction to hear or determine any of the matters complained of by plaintiff, or any issue that could be joined thereby.

2. That the matters complained of by plaintiff do not constitute a cause of action of any kind against these defendants or any of them.

3. That the plaintiff is not entitled to the relief prayed for in his said action, or any relief, and that the court has no jurisdic-

27 tion to grant the relief which plaintiff seeks."

The material facts alleged in the affidavit of the plaintiff upon which the alternative writ was issued, and upon which, at the hearing, a mandatory writ was granted are, as follows: That the defendants are the officers of the bank, and that the books, accounts and notes are in possession and under the control of defendants; that the plaintiff is a stockholder in said bank, and, as such, "on or about the 1st day of February, 1903, made a demand upon said directors and also upon said J. W. Guthrie, as president, A. R. Heywood, vice-president and general manager of said bank, and also upon R. T. Hume, as assistant cashier of said bank, for permission to permit affiant to inspect all books, accounts, and loans of said bank, and affiant made demand for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank; that each and all of said persons refused permission to affiant to inspect the books, accounts and loans of said bank at any time or at all, and still refuses to permit such inspection; that he seeks this inspection for the purpose of ascertaining the value of his stock in said bank, and for the purpose of ascertaining whether the business affairs of said bank have been properly conducted according to law; that loans have been made to a favored few of the patrons of said bank of more than one-tenth of the capital stock to each of said patrons, which is contrary to law, and that he

believes the said directors and officers of said bank have been guilty of other irregularities which can only be stated after an inspection of the books, accounts and loans of said bank."

The only question involved is shown by the following quotation from appellants' brief, to-wit: "At the trial the only issue presented was whether a stockholder of a national bank, created and
28 controlled by acts of Congress, possesses the same powers and rights of access to and inspection of the books as are possessed by the stockholders of other corporations."

The right of inspection is a common-law right, and unless restricted by statute, or the corporation's charter, will not be denied when sought by a stockholder for a proper purpose. The provision that "all books of any corporation shall at all reasonable hours be subject to the inspection of any *bona fide* stockholder, contained in sec. 329 of the Revised Statutes of Utah, does not restrict the common-law right, but is in harmony therewith; therefore, unless, as claimed by appellants' counsel, inspections of the character sought in this case are prohibited by the following provisions of the national bank act, viz: "No association shall be subject to any visatorial powers other than such as are authorized by this title, or are vested in courts of justice," the writ in question was properly granted. Visatorial powers and the stockholder's right of inspection are not one and the same thing.

In 7 Am. & Eng. Ency. Pl. & Pr., 855, visitation of corporations is correctly defined, and its purposes aptly stated as follows: "By visitation of corporations is meant the act of examining into its affairs. The person authorized to make such examination is called the visitor. The purpose of visitation is to supervise, direct, and control the management of the corporation."

Numerous cases and authorities are cited which support the text. See also text and cases cited in 1 Abbot's Digest of Law of Corp. 873.

29 The visatorial power over private eleemosynary corporations vests in the founder, or his heirs, but they may appoint others to act.

In the United States visatorial power over all except private eleemosynary corporations, existing under and by virtue of the laws of a State, vests in the State, and as to those formed under an act of Congress, it vests in the General Government, and is exercised through the medium of the courts, or by visitors appointed for that purpose by or in pursuance of statutes. It is correctly stated in Merrill on Mandamus, sec. 175, that, "Visitors of corporations have power to keep them within the legitimate sphere of their operations and to correct all abuses of authority and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and in the absence of such the State is the visitor of all corporations."

The common-law right of inspection by the stockholder is a personal privilege arising from his ownership of stock of the corpora-

tion, and can be exercised for any legitimate purpose beneficial to him, without any special appointment for that purpose; but he cannot in its exercise, as the State through the medium of the courts, or a visitor may do, interfere with or direct the general operations of the corporation.

The difference between the visitorial powers over corporations and the stockholder's right of inspection is obvious.

We are clearly of the opinion that section 5241 of the Rev. Stat. of the U. S., before quoted, does not apply to or in any way affect the common law right of stockholders.

Winter *v.* Baldwin, 89 Ala. 483.
Matter of Tuttle *v.* Iron Nat'l Bank, 170 N. Y. 9.

The judgment granting the writ of mandamus is affirmed, with costs.

We concur:—

BARTCH, *J.*
McCARTY, *J.*

30 In the Supreme Court of the State of Utah.

HENRY O. HARKNESS, Plaintiff,
vs.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, Defendants.
} Petition for Writ of Error.

Now comes the said J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon defendants therein and say, that on or about the 9th, day of February, A. D. 1904, this court entered judgment herein in favor of the plaintiff and against these defendants in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of these defendants all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, these defendants pray that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, and proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

ABBOT R. HEYWOOD,
GEORGE McCORMICK,
Attorneys for Defendants.

[Endorsed:] 1498 Harkness *vs.* Guthrie *et al.* Pet. for writ of error Filed Feb. 12 1904 —— —— clerk supreme court, Utah.

31 In the Supreme Court of the State of Utah.

HENRY O. HARKNESS, Plaintiff,
vs.
J. W. GUTHRIE, A. R. HEYWOOD, Henry Conant, Edward Conant, Patrick Healy, R. T. Hume, and O. M. Runyon, Defendants. } Order Allowing Writ of Error.

This 12 day of February, 1904, comes the defendants by their attorneys and *and* file herein and present to the chief justice of this court their petition with assignment of errors showing that a Federal question was involved and praying for the allowance of a writ of error intended to be urged by them: also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the chief justice of this court does allow the writ of error upon the defendants giving a bond according to law in the sum of 300 three hundred dollars which shall operate as a supersedeas bond.

ROBERT N. BASKIN,
Chief Justice of the Supreme Court of the State of Utah.

[Endorsed:] 1498. Harkness *vs.* Guthrie *et al.* Order allowing writ of error. Filed Feb. 12, 1904. —— —— clerk supreme court, Utah.

32 In the Supreme Court of the United States.

J. W. GUTHRIE, A. R. HEYWOOD, HENRY Conant, Edward Conant, Patrick Healy, Rechard T. Hume, and O. M. Runyon, Plaintiffs in Error,
vs.
HENRY O. HARKNESS, Defendant in Error. } Writ of Error to Supreme Court of Utah.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah before — or some of you, being the highest court of the law or equity of the said State in which a decision could be had in

the said suit between Henry O. Harkness, plaintiff and J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, defendants as aforesaid, wherein was drawn in question the validity of an authority exercised under the statutes of the said State, on the ground of the same being repugnant to the laws of the United States, and the decision was in favor — such, their validity and wherein was drawn in question the construction of a clause of a statute of the United States and the decision was against the right claimed under such clause of said statute, a manifest error has happened, to the great damage — J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, as by *this* complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, 60 days*
so that you have the same at Washington on the 12th day of April 1904, in the said Supreme Court to be then and there held, that, *in* the record and proceedings aforesaid being inspected, the said Supreme Court, may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

33 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, on the 12 day of February, 1904.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District of Utah.

[Endorsed:] 1498. Harkness *vs.* Guthrie *et al.* Writ of error to sup. ct. Utah Filed Feb. 12, 1904 —— —— clerk supreme court, Utah.

34 In the Supreme Court of the United States.

J. W. GUTHRIE, A. R. HEYWOOD, HENRY Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, Plaintiffs in Error,
vs.
HENRY O. HARKNESS, Defendant in Error.
} Assignments of Error.

Afterwards to wit, on the first Monday in October, in this same term before the justices of the Supreme Court of the United States

[* In pencil in copy.]

at its Capitol, in the *State* of Washington, comes the said plaintiffs in error by A. R. Heywood, their attorney and say that in the record and proceedings of the supreme court of Utah aforesaid there is manifest error, in this to wit.

1. That by the action of the supreme court of Utah, herein the Commercial National Bank, of Ogden, organized and operatting under the national banking laws of the United States is made and these plaintiffs in error as directors thereof are made subservient to the laws of Utah refer-ing to visitorial powers contrary to the provisions of section 5241, of the Revised Statutes of the United States.

2. That by the action of the supreme court of Utah, herein it is attempted to control and conduct the affairs of said bank and the operations of the said plaintiffs in error as directors thereof, contrary to the provisions of sections 5240, and 5241, of the Revised Statutes of the United States.

3. That by the action of the supreme court of Utah, herein it is attempted to interfere with the workings of said bank and control the duties of the directors thereof, contrary to sections 5240, and 5241, of the Revised Statutes of the United States.

4. That by the record aforesaid it appears that the judgment aforesaid was given for said Harkness against said J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume and O. M. Runyon, whereas by the laws of the land the said judgment ought to have been given for the said J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, against the said Henry O. Harkness, and the said J. W. Guthrie, A. R. Heywood, Patrick Healy, Richard T. Hume, Henry Conant, Richard Conant, and O. M. Runyon, prays that the said judgment of the supreme court of Utah may be reversed and annulled and altogether held for nothing and that they may be restored to all things which they have lost by the occasion of said judgment.

35

ABBOT R. HEYWOOD,
Attorney for Plaintiff in Error.

[Endorsed:] 1498. Harkness *vs.* Guthrie *et al.* Assignment of errors. Filed Feb. 12, 1904. —— —— clerk supreme court, Utah.

36 In the Supreme Court of the State of Utah.

HENRY O. HARKNESS, Plaintiff,
vs.
J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, Defendants. } Citation.

To Henry O. Harkness and to H. H. Henderson, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah, wherein J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, are plaintiff- in error and you are defendant in error, and show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert N. Baskin, chief justice of the supreme court of Utah, this 12th day of February, 1904.

ROBERT N. BASKIN,
Chief Justice Supreme Court of Utah.

I hereby this 12th day of February, 1904, accept due personal service of this citation on behalf of Henry O. Harkness, defendant in error.

HENDERSON & MACMILLAN,
Attorney- for Defendant in Error.

37 In the Supreme Court of the State of Utah.

J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, Plaintiffs in Error,
v.
HENRY O. HARKNESS, Defendant in Error. } Bond.

Know all men by these presents that J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, as principals, and Fred J. Kiesel and Theodore Schansenbach, as securities, are held and firmly bound to the defendant in error, Henry O. Harkness, in the full and just sum of three hundred ($300.00) dollars, to be paid to the said defendant in error, Henry O. Harkness, his certain attorneys, administrators,

executors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 12th day of February, A. D. 1904.

Whereas lately, as a supreme court of the State of Utah, in a suit depending in the said court between the said parties as above, a judgment affirming the judgment of the second district court of the said State of Utah was rendered against the above plaintiffs in error, and they having obtained a writ of error and filed a copy
38 thereof in the office of the clerk of the Supreme Court of the United States to reverse the judgment of the aforesaid suit, and a citation directed to the said Henry O. Harkness, citing and admonishing him to be and appear at a session of the Supreme Court of the United States within sixty days from date of said citation, to-wit: the 12th day of February, 1904.

Now, the condition of the above obligation is such that if said plaintiffs in error shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

FRED J. KIESEL.
THEO. SCHANSENBACH.

J. W. GUTHRIE,
HENRY CONANT,
EDWARD CONANT,
PATRICK HEALEY,
RICHARD T. HUME,
O. M. RUNYON,
By ABBOT R. HEYWOOD,
Their Attorney,
A. R. HEYWOOD.
Principals.

Signed, sealed and delivered in the presence of
T. R. O'CONNOLLY.

STATE OF UTAH, } ss:
County of Weber, }

Fred J. Kiesel and Theo. Schansenbach, being first duly sworn, each for himself says:

That he is a resident and freeholder within Weber county, Utah, and worth the amount specified in said bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

FRED J. KIESEL.
THEO. SCHANSENBACH.

Subscribed and sworn to before me this 12th day of February, 1904.

[SEAL.] T. R. O'CONNOLLY,
Notary Public, Weber County, Utah.

The foregoing bond and security for costs was taken by me and is hereby approved this 12th day of February, 1904.

ROBERT N. BASKIN,
Chief Justice Supreme Court Utah.

39 UNITED STATES OF AMERICA.

STATE OF UTAH, }
County of Salt Lake, } ss:

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, pursuant to a writ of error allowed in the case wherein J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healey, Richard T. Hume, and O. M. Runyon are plaintiffs in error, and Henry O. Harkness is defendant in error, do herewith transmit attached hereto a copy of the transcript of the record and proceedings had in this court in this cause, as also a copy of the judgment, opinion and bond filed herein, together with the original application for a writ of error, order allowing the writ, writ of error, citation and assignments of error.

I further certify that said transcript of the record and proceedings, judgment, opinion and bond are full, true and correct copies of the several originals now on file or of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court this 16th day of February, A. D. 1904.

[Seal State of Utah Supreme Court, Jan. 4, 1896.]

LILBURN P. PALMER,
Clerk Supreme Court, State of Utah.

Endorsed on cover: File No. 19,251. Utah supreme court. Term No. 197. J. W. Guthrie, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume, & O. M. Runyon, plaintiffs in error, *vs.* Henry O. Harkness. Filed February 27", 1904. File No. 19,251.

FILE COPY.

Office Supreme Court U. S.
FILED
DEC 15 1904
JAMES H. McKENNEY,
Clerk

Can a Shareholder in a National Bank as of right demand an inspection of that portion of the business which is essentially confidential, to-wit: the loans, and deposits of customers?

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 196.

J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD CONANT, PATRICK HEALY, RICHARD T. HUME AND O. M. RUNYON, PLAINTIFFS IN ERROR,

vs.

HENRY O. HARKNESS.

Writ of Error to Supreme Court of Utah.

BRIEF OF PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 197.

J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD CONANT, PATRICK HEALY, RICHARD T. HUME AND O. M. RUNYON, PLAINTIFFS IN ERROR,

vs.

HENRY O. HARKNESS.

BRIEF OF PLAINTIFFS IN ERROR.

I.

STATEMENT.

The defendant in error, Harkness, is a stockholder of record in the Commercial National Bank, of which plaintiffs in error are the directors. The bank is organized and existing under and by virtue of the laws of the United States, and is doing a banking business in Ogden City, Utah. Prior to the commencement of this action Harkness made a proper demand for permission to inspect all books, accounts *and loans* of said bank at such time as would not interfere with the proper conduct and operation of the bank, which permission was by defendants refused. He alleges that he desires this inspection for the purpose of ascertaining the value of his stock in said bank, and also for the purpose of ascertaining whether the business affairs of said bank have been properly conducted according to law. (He also alleged that loans had been made to certain patrons contrary to law and that the directing officers of the bank had been guilty of other irregularities which he is unable to state, because, as he alleges, they can only be stated after an inspection of the books, accounts and loans of said bank. There was no proof of these

allegations, however, introduced at the trial and no claim there that they existed).

Upon filing an affidavit containing the foregoing, an alternative writ of mandate issued, directing plaintiffs in error to allow the desired inspection or show cause why such inspection should not be permitted, which upon the trial was made peremptory and final judgment entered for defendant in error. This judgment was on appeal affirmed by the Supreme Court of Utah.

II.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

1. That by the action of the Supreme Court of Utah herein, the Commercial National Bank of Ogden, organized and operating under the national banking laws of the United States is made, and these plaintiffs in error as directors thereof are made subservient to the laws of Utah referring to visitorial powers contrary to the provisions of Section 5241 of the Revised Statutes of the United States.

2. That by the action of the Supreme Court of Utah, herein it is attempted to control and conduct the affairs of said bank and the operations of said plaintiffs in error as directors thereof, contrary to the provisions of Sections 5240 and 5241 of the Revised Statutes of the United States.

3. That by the action of the Supreme Court of Utah, herein it is attempted to interfere with the workings of said bank and control the duties of the directors thereof, contrary to Sections 5240 and 5241 of the Revised Statutes of the United States.

4. That by the record it appears that judgment was given for said Harkness against said Guthrie et al, whereas by the laws of the land said judgment ought to have been given for the said Guthrie et al against the said Harkness, and praying that the same may be reversed and annulled.

See page 19 of the record.

III.

ARGUMENT.

At the trial the only issue presented was whether a stockholder of a *National* Bank, created and controlled by Acts of Congress,

possesses powers and rights of access to and inspection of all the books, loans and papers appertaining to the carrying on of the business.

The Act of Congress upon this point is as follows:

> "Section 5241, R. S. U. S. (National Bank Act): No association shall be subject to any visitorial powers other than such as are authorized by this title or are vested in courts of justice."

The only provision of our state laws applicable are the following:

Section 329 R. S. Utah:

> "The books of every corporation *organized under the laws of this state* must be so kept as to show the original stockholders, their interests, the amount paid on their shares and all transfers thereof; all books of *any corporation* shall at all reasonable hours be subject to the inspection of any bona fide stockholder of record."

In addition to this provision there also exists a penal statute as follows:

4415. Refusal of inspection of corporate books:

> Every officer or agent of any corporation having or keeping an office within this state who has in his custody or control any book, paper or document of such corporation and who refuses to give to a stockholder or member of such corporation lawfully demanding during business hours to inspect or take a copy of the same, or any part thereof, a reasonable opportunity so to do is guilty of a misdemeanor.

The trial court in his opinion said: "Neither of these Utah statutes can be applicable to corporations organized for banking purposes under the laws of Congress, using the following quotations:

> Undoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.
>
> Easton vs. Iowa, 188 U. S. 220.

This same principle is plainly laid down in the case of Davis vs. Elmira Sav. Bank, 161 U. S. 275, where the Court says:

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such are necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sustained by the repeated adjudications of this court.

And again, in the case of Prigg vs. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060, and Farmers' & M. Nat. Bank vs. Dearing, 91 U. S. 29, 23 L. ed. 196, it is said:

> If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provision made by it.
>
> The states can exercise no control over them (national banks), nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single state cannot give."

Further reasoning upon that line, in the case of Easton vs. Iowa, the Supreme Court says:

> The Federal legislation creating and regulating national banks * * * has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states. * * *

> A National Bank is not considered a private corporation, * * * but as a public corporation created for public and national purposes. * * * Such being the nature of these national institutions, it must be obvious that their operations cannot be limited or controlled by state legislation. * * * We are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

Trial Judge Rolapp then sums up:

> So that, even if our statutory provisions were intended to be applicable to national banks, imposing additional or supplementary state burdens upon them, there would seem to be no longer any necessity to determine that any state legislation which attempts to describe the duties or control the affairs of a national bank, or which even attempts to supplement any legislation enacted by Congress affecting these banks, is absolutely void and of no effect.

But after using the foregoing language the Court ordered judgment for plaintiff (defendant in error) on the ground "that the right of inspection of corporate books *is a common law right* existing in favor of a stockholder in any corporation." And this view was also taken by the Supreme Court of Utah on the appeal.

It is hard to understand how a common law right could be greater than a statutory one covering the same question.

It is only when the legislative power has not acted that the common law steps in. If the legislature has acted then the common law is superceded and in no event could the common law be valid (in force), and a statute covering the same ground be invalid.

The controlling authority of the Easton case is best expressed by the following words, found in the opinion of the same case when before the Supreme Court of Iowa 85 N. W. Rep. 796: "We do not find that this precise question has ever been passed upon by the Supreme Court of the United States—*the only tribunal that may render a final determination of it.*"

In this (Easton) case this final tribunal has passed upon this question and in words that cannot be misunderstood.

All the cases used by counsel for respondent below were anterior to this Easton case.

The extreme length to which the State Courts before that decision went are best illustrated by an Alabama case (Winter vs. Baldwin, 89 Ala. 483) where it was held that the provision (Sec. 5241 R. S. U. S.) "that banks *shall not be subject to any visitorial powers* other than those authorized by Congress or vested in the courts of justice," did not exempt national banks from the operation of the state statute. Our Supreme Court also in the opinion says: "Visitorial powers and the stockholders' right of inspection are not one and the same thing."

It is respectfully urged that the words contained in Sec. 5241 R. S. U. S. that "banks *shall not be subject to any visitorial powers* other than those authorized by Congress or vested in courts of justice," by the very nature of the Corporation must apply to shareholders, for no one else would have the shadow of such right, except, possibly, tax assessors; but their rights are provided for by other sections which this court has already many times construed. To say that that section does not completely cover the question is to wholly deny any force to language. According to Webster visitorial (visitation) means "access for inspection or examination."

The trial court took much of his reasoning from the opinion rendered in the case of Tuttle vs. Iron Nat. Bank, 62 N. E. Rep., 762 (S. C. 170 N. Y. Court of Appeals, p. 9), but instead of adopting the judgment entered there he granted the full relief prayed for. Our Supreme Court also used the case as authority in its opinion.

The judgment in the Tuttle case ordered the officers of the bank to give the stockholders: first, a description of all real estate owned by the bank; second, a copy of all the notes charged to the profit and loss account within three years past; third, a description of all bonds owned by the bank.

These plaintiffs in error directors think that judgment is fair. They have always conceded shareholders should be shown sufficient to exhibit the condition of the bank, but to go farther and allow them to inspect the loans and individual deposits would reveal the private business of the customers, thereby angering them and causing them to go elsewhere for the future.

Stock in national banks is a favorite investment, being almost universally divided among a large number of shareholders and often an investor having stock in rival banks.

For example, the three National banks of Ogden have some common shareholders, holding stock in all.

The statute of the United States was founded in reason, for were it otherwise what havoc could a tattling shareholder work?

In order to carry on these institutions without creating disturbance in the financial world it is absolutely necessary for the officers to guard with the highest faith the privacy of their clients' affairs.

A bank can never be too guarded in their expressions concerning a customer. Take their relations with a borrower. It may be there are others who have trusted the same man. They may become uneasy about the payment of their money. They may try to get something covertly out of the bank. If by so much as a question or an intimation the fact be told that the customer in question is a borrower, this outside creditor may become alarmed. In his efforts at a hurried collection he may precipitate a crisis which will cause a failure.

There are many vicissitudes in business of which the world knows nothing. Few of them escape the bank. It is the secrecy between these two, the trust in matters of vital importance, which fastens them together with hooks of steel. Its business is built on the confidential relations had with its customers, and it must have no inclination to do other than serve those who patronize and trust them.

In busiuess there is no more confidential relation established than that between the bank and its customer.

The customer trusts the honor and secrecy of the bank no less implicitly than he does their honesty. And it is as important that the affairs disclosed by the bank records be kept a secret as it is that the money be returned. It is possible to do lasting harm by revealing a customer's private affairs.

Such knowledge as this, if it were revealed, would also decrease the confidence of the public. These secrets should be all buried in the heart of the banker.

To say that the privacy could be guarded by shareholders as well as directors is to shut one's eyes to all human nature.

Officers are selected with special reference to the work needed. Shareholders become such by their own choice and not by any selection.

A small shareholder must have the same rights as a larger one, and whether he be small or large, once let him have this as a right all would have it and doubtless insist on it, thereby not only interfering with the dispatch of business but allowing a venal mind or a curious or gossipy one to scatter the information which honor and business success demand should be held inviolable.

Plaintiff says that he desires the inspection for the purpose of ascertaining the value of his stock and whether the business affairs have been properly conducted according to law.

If the judgment in the Tuttle case supra should be followed both of those desires would be fully met.

For as a supplement he has five times a year, by law, a sworn published statement of the condition of the bank and at least twice a year, by law, an examination made by an expert officer of the Comptroller of the Currency.

With such information both the value of the stock and the fidelity of the officers can be determined.

To in addition demand to know the makers' names of the notes and the amount to an individual depositor's credit would only be a matter of curiosity or a temptation to venality.

The statement of the bank tells all the public is entitled to know concerning its management. If anyone have further rights in the matter, they are amply supplied in the Examiner, an officer of the United States duly empowered and sworn. It is as important to the bank that its own private business, as an artificial person, be not known as that that of the individual or natural person be kept secret and for the same reasons.

It is respectfully submitted that the Supreme Court of Utah should be reversed.

ABBOT R. HEYWOOD,
Attorney for Plaintiffs in Error.

GEO. MCCORMICK,
Counsel.

FILE COPY.

No. 9.

SUPREME COURT OF THE UNITED STATES

[redacted]

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JAMES H. McKENNEY,
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J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD CONANT, PATRICK HEALY, RICHARD T. HUME and O. M. RUNYON,

Plaintiffs in Error,

v.

HENRY O. HARKNESS,

Defendant in Error.

Writ of Error to Supreme Court of Utah.

BRIEF OF DEFENDAMT IN ERROR.

SUPREME COURT OF THE UNITED STATES

No. 197.

J. W. GUTHRIE, A. R. HEYWOOD, HENRY CONANT, EDWARD CONANT, PATRICK HEALY, RICHARD T. HUME and O. M. RUNYON,

Plaintiffs in Error,

v.

HENRY O. HARKNESS,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

I.

STATEMENT.

On the 13th day of April, 1903, Henry O. Harkness, defendant in error in this action, filed an affidavit in the Second Judicial District Court of Weber County, Utah, against the plaintiffs in error, for a writ of mandate to compel the plaintiffs in error to permit the defendant in error to inspect the books, accounts and loans of the Commercial National Bank of Ogden, Utah.

The affidavit sets out that the plaintiffs in error are

the directors of the Commercial National Bank of Ogden, which bank is organized and existing under and pursuant to the laws of the United States; that said bank has a capital stock of $100,000.00, divided into 1,000 shares, of the par value of $100.00 per share; that affiant (defendant in error) is the owner of 183⅓ shares of the capital stock of said bank, of the par value of $18,333⅓ dollars.

That on the 1st day of February, 1903, affiant made a demand upon said directors and also upon J. W. Guthrie, as president, A. R. Heywood, as vice-president and general manager of the bank, and also upon Richard T. Hume, as assistant cashier of said bank, for permission to permit affiant to inspect all books, accounts and loans of said bank at such time or times as would not interfere with the proper conducting and operating of said bank; that each and all of said persons refused permission to affiant to inspect the books, accounts and loans of said bank at any time or at all, and still refuse to permit such inspection.

Affiant further states he is entitled to the inspection of the books, accounts and loans of said bank, for the reason he is a stockholder of said bank and interested therein; that he seeks such inspection for the purpose of ascertaining the value of his stock in said bank, and for the purpose of ascertaining whether the business affairs of said bank have been properly conducted according to law: that loans have been made to a favored few of the patrons of said bank of more than one-tenth of the capital stock to each of said patrons, which is contrary to law; that he believes said directors and officers of said bank have been guilty of other irregularities, the specific kind of said irregularities he is unable to state at this time, and which can only be stated after an inspection of the books, accounts

and loans of said bank. (Trans. of Rec. pages 1 and 2).

Upon the facts set out in said affidavit, the Court issued an alternative writ of mandate for the plaintiffs in error to permit such inspection or to show cause. (Trans. of Rec. pages 3 to 6).

Plaintiffs in error did not permit such inspection and filed an answer, which answer denies *none* of the facts set out in the affidavit or in the alternative writ of mandate.

The answer sets out that the Court had no jurisdiction to hear or determine any of the matters complained of by defendant in error, or any issue that could be joined thereby.

That the matters complained of by defendant in error do not constitute a cause of action of any kind against these plaintiffs in error or any of them, and further,

That the defendant in error is not entitled to the relief prayed for in said action or for any relief, and that the court has no jurisdiction to grant the relief which defendant in error seeks. (Trans. of Record page 6).

After hearing the issues raised in said action the Court made findings of fact and conclusions of law and entered a decree for the plaintiffs in error to permit the defendant in error to inspect the books, accounts and loans of the Commercial National Bank, and that such inspection be made at such time or times as not to interfere with the proper operations of said bank. (Trans. of Record pages 7 to 8).

The plaintiffs in error afterwards appealed to the Supreme Court of the State of Utah, which Court entered a judgment affirming the judgment of the lower Court. (Trans. of Record pages 13 to 16).

Harkness v. Guthrie, et al., 27 Utah Rep., 248.

Thereafter the plaintiffs in error took out a Writ of Error to this Court for the purpose of reviewing said judgment.

II.

ARGUMENT.

The defendant in error, through his counsel, has filed a motion in this Court to dismiss the Writ of Error in this case for the want of jurisdiction, because there is no federal question involved of which this Court can take cognizance, or if the Writ of Error shall not be dismissed, that the judgment of said Supreme Court of the State of Utah be affirmed, although in the opinion of this Court the record may show this Court has jurisdiction, it being manifest that the said Writ of Error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Counsel for defendant in error did not file a brief with this motion, for the reason that counsel believed that a discussion of this motion involved a discussion of the merits of the case, and for the further reason that counsel for defendant in error are perfectly willing to have this question decided upon its merits.

The answer as filed by plaintiffs in error raises the question whether the State Court has jurisdiction to take cognizance of this matter at all. This involves the question whether Congress has passed any act that would permit the State Court to pass upon an issue of this kind.

Fourth section of the Act of Congress, March 3rd, 1887, 24 Stat 552, c. 373 as amended by Act of August 13th, 1888, 25 Stat. 433, c. 866, is as follows :

"Section 4: That all National banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal or mixed, and all suits in equity be deemed citizens of the states in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state."

See also Petri v. Commercial Bank, 142 U. S. 644.
Whittemore v. Amoskeag Bank, 134, U. S. 527.
McClellan v. Chipman, 164, U. S. 347.

This statute and the cases cited would seem to give the State Courts jurisdiction where formerly the United States Circuit and District Courts had exclusive jurisdiction.

Section 329 of the Revised Statutes of Utah, 1898, reads as follows:

"Section 329. The books of every corporation organized under the laws of this state must be so kept as to show the original stockholders, their interests, the amount paid on their shares, and all transfers thereof; all books of any corporation shall at all reasonable hours, be subject to the inspection of any bona fide stockholder of record."

This statute of itself we do not think gives the defendant in error the right to inspect the books and accounts of a National Bank, but we do claim that the defendant in error had a common law right as a stockholder of this bank to inspect all the books and accounts at all proper times, and we further say this right has not been abridged by any Act of Congress or by any by-law, or article contained in the charter of said bank.

All the text writers and nine-tenths of the decisions are uniform concerning this matter.

Justice Vann, writing an opinion for the Court of Appeals of the State of New York, in re Steinway, says:

> "The right of a corporator, who has an interest in common with the other corporators, to inspect the books and papers of the corporation, for a proper purpose and under reasonable circumstances, was recognized by the court's of King's bench and chancery from an early day, and enforced by motion or mandamus, but always with caution, so as to prevent abuse. Rex v. Newcastle-upon-Tyne, 2 Strange 1223 and note; Gery v. Hopkins, 7 Mod. 129, case 175; Richards v. Patinson, Barnes, N. C., 235; Young v. Lynch, 1 W. Bl. 27; Rex v. Shelly, 3 T. R., 141; King v. Babb, 3 T. R. 579, 580; King v. Merchant Tailors' Co., 2 Barn. & Ad. 115; Re Burton, 31 L. J. Q. B. N. S. 62; Re West Devon Great Consols Mine, L. R. 27 Ch. Div. 106. Lord Kenyon in rendering judgment in King v. Babb, assumed 'that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation.' In Gery v. Hopkins, the court, on granting the order to produce, said: 'There is great reason for it, for they are books of a public company and kept for public transactions, in which the public are concerned, and the books are the title of the buyers of stocks by act of parliament.' In Rex v. Newcastle-upon-Tyne the Reporter states that the court said: 'Every member of the corporation had, as such, a right to look into the books for, any matter that concerned himself, though it was in a dispute with others.'

"The following cases arose in this state, but the most of them are not strictly in point, as they rest mainly upon statutory authority, which does not extend to the case in hand: People, Hatch, v. Lake Shore & M. S. R. Co. 11 Hun. 1, Affirmed, sub. nom. Re Sage, in 70 N. Y. 222; People, Stobo, v. Eadie, 63 Hun. 320, 133 N. Y. 573; Cotheal v. Brouwer, 5 N. Y. 562; People, Onderdonk, v. Mott, 1 How. Pr. 247; People, Harriman, v. Paton, 20 Abb. N. C. 172 and 195; People, Richmond, v. Pacific Mail S. S. Co. 50 Barb. 280; People, Field, v. Northern P. R. Co. 18 Jones & S. 456; People, Clason, v. Nassau Ferry Co. 86 Hun. 128; Central Cross-Town R. Co. v. Twenty-third street R. Co. 53 How Pr. 45; People, Muir, v. Throop, 12 Wend. 183.

"The courts of other states compel the officers of corporations to allow stockholders to examine the books upon due application for a proper purpose. In Lewis v. Brainerd, 53 Vt. 520, the court said: 'The shareholders in a corporation hold the franchise and are the owners of the corporate property; and as such owners they have the right, at common law, to examine and inspect all the books and records of the corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property.' In Huylar v. Cragin Cattle Co. 40 N. J. Eq. 392, 398, it was said: 'Stockholders are entitled to inspect the books of the company for proper purposes at proper times, * * and they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protecion. To say that they have the right, but that it can be enforced only when they have ascertained, in some way, without the books, that their affairs have been mismanaged or that their interests are in danger, is practically to deny the

right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders.' In Com. Sellers, v. Phoenix Iron Co. 105 Pa. 111, 116, 51 Am. Rep. 184, the rule was laid down that, 'unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them, for a definite and proper purpose, at reasonable times. The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property af all the stockholders.' Upon a second appeal in the same case, subnom. Phoenix Iron Co. v. Com. Sellers, 113 Pa. 563, 572, the court said: 'Under the circumstances mentioned and for the purposes stated, we are of opinion that, according to our ruling when the case was here before, the relator is clearly entitled to an examination of the books and papers of the company. Such a right is, of course, not to be exercised to gratify curiosity or for speculative purposes, but in good faith and for a specific honest purpose, and where there is a particular matter in dispute, involving and affecting seriously the rights of the relator as a stockholder * * A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers (the reator) was not bound to accept the mere statement of the board, whether under oath or otherwise, as to the contents of the books, etc. He had a right to a reasonable personal inspection of them, and, with the aid of a disinterested expert, might make such extracts as were reasonably required in the preparation of the bill he proposed to bring. The relator, we think, has a clear right, under the writ and return, to the relief

he asks, and it is plain that he has no specific legal remedy for the enforcement of that right; and the existence of a supposed equitable remedy is not a ground for refusing the mandamus.' In Cockburn v. Union Bank, 13 La. Ann. 289, 290, the court, in granting a mandamus requiring the officers of a corporation to allow access by a stockholder to the books, said: 'A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land; as long, then, as the charter, or the rules and by-laws passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full, and can demand to exercise them. It cannot be denied that it is the right of everyone to see that his property is well managed, and to have access to the proper sources of knowledge in this respect.' The same court, in a like case, declared that a stockholder in a trading corporation 'has, in the very nature of things, and upon principles of equity, good faith, and fair dealing, the right to know how the affairs of the company are conducted,—whether the capital of which he has contributed so large a share is being prudently and profitably employed or otherwise * * In order to comply with this call, and to vote understandingly, it was certainly requisite for the relator to know the condition of the affairs and business operations of the company, and be enabled from this knowledge to act for the best interests of the stockholders and of the company.' State, Martin, v. Bienville Oilworks Co. 28 La. Ann, 204, 208. See also Stone v. Kellogg, 165 Ill. 192; Stettauer v. New York & S. Constr. Co. 42 N. J. Eq. 46; People, Bishop, v. Walker, 9 Mich. 328; State, Bergenthal, v. Bergenthal, 72 Wis. 314.

"The elementary works unite in holding that a corporator has the right in question, and that mandamus is a proper remedy. Mr. Wait, in his work on Insolvent

Corporations, after reviewing the authorities, says: 'It will be apparent from an examination of these authorities that the rule in favor of a stockholder's right of inspection and investigation of corporate books and papers is becoming very broad and general.' Section 504. But while the learned author recognizes the rule, he insists—and we agree with him—that an inspection should 'not be granted to facilitate speculative schemes or to gratify idle curiosity.' He declares that 'mandamus is the most complete and effective form of redress available to a stockholder or party in case of a denial of the right of inspection.' Section 516. Mr. Cook in discussing the question, says that 'the stockholders of a corporation had, at common law, a right to examine at any reasonable time and for any reasonable purpose, any one or all of the books and records of the corporation. This rule grew out of an analogous rule applicable to public corporations and to ordinary co-partnerships, the books of which, by well-established law, are always open to the inspection of members.' 2 Cook. Stock & Stockholders. Section 511. 'The prevailing doctrine in the United States is said to permit an incorporator the same freedom in examining the books of the company as a partner has with respect to the books of his firm. But the right only extends to such documents as are necessary to the stockholder's particular purpose * * Statutes giving the shareholders of corporations the right to inspect the corporate books have been passed in many of the American States and in England.' These statutes, however, do not supplant the common law-right.' I Beach, Priv. Corp. Section 75. Judge Thompson, in his work on Corporations, says: 'One of the privileges incident to ownership of stock in a corporation, is that of an inspection of the books and condition of the company, and this privilege, in general, becomes a right when the

inspection is sought at proper times and for proper purposes.' Section 4406. He further declares that when the right is guaranteed by statute the motive for its exercise is immaterial, but when it rests upon the common law it will not be allowed for speculative purposes, the gratification of curiosity, or where its exercise would produce great inconvenience. Sections 4412-4420. See also Ang. & A. Corp. 9th Ed. Section 681; Morawetz, Priv. Corp. 473; High, Extr. Legal Rem. Section 308; 19 Am. and Eng. Enc. Law, p. 231.

"We think that, according to the decided weight of authority, a stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose, and that, if this right is refused by the officers in charge, a writ of mandamus may issue, in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court; but the writ should issue as a matter of course although even then, doubtless, due precautions may be taken as to time and place, so as to prevent interruption of business or other serious inconvenience."

In Re Steinway, 159 N. Y. 250.

Tuttle Iron National Bank(N. Y.) 170 N. Y. 9, 62, N. E. Rep. 761.

State v. Pacific Brewing & Malting Co. 58 Pac. 584.

Winter v. Baldwin, 89 Ala. 483.

Section 329 of the Revised Statutes of Utah, above quoted, is not exclusive of the stockholder's right to examine the books of the corporation. The common law-right of the stockholder to examine the books of a corporation in which he is interested is not abridged by a statute unless the statute so expresses it or that it is obvious from the reading of the statute that that is the intention.

Justice Vann, In Re Steinway, *supra*, says:

> "We do not think that the statute now in force is exclusive, or that it has abridged the common law right of stockholders with reference to the examination of corporate books. By enabling a stockholder to get some information in a new way, it did not impliedly repeal the common-law rule which enabled him to get other information in another way; for the courts do not hold the common-law to be repealed by implication, unless the intention is obvious. By simply providing an additional remedy the existing remedy was not taken away. The statute merely strengthened the common-law rule with reference to one part thereof. and left the remainder unaffected."

While there is no common law of the United States in the sense of a national customary law, yet where a point is decided by the adjudged cases or laid down as settled in the books of acknowledged authority, the Supreme Court should act upon it as the common law, unless some Act of Congress or local suit or decision of the Supreme Court prescribes another rule.

Homes v. Jennison, 14 Pet., page 626.
Smith v. Ala., 124 U. S., 478.
Bucher v. Chesshire R. R., 125 U. S., 582.
U. S. v. Wong Kim, Ark., 169 U. S. 660.

Counsel for plaintiffs in error relied upon Section 5241 of the Revised Statutes of the United States to support their view of this case. Said Section reads as follows:

> "Sec. 5241. No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice."

The persons that are authorized under this Title to make examination are those that are appointed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury.

If these inspectors that are appointed by the Comptroller of the Currency are the only persons that have a right to examine the books and accounts of a National Bank, then the latter part of Section 5241 of the Revised Statutes of the United States would be of no force. The words "or are vested in the courts of justice" would mean nothing. Courts of justice, as a rule, do not act on their own motion.

Congress when it added the words "or are vested in the courts of justice" must have intended not to give the exclusive right of inspection to inspectors appointed by the Comptroller of the Currency, but that there might be an occasion when a stockholder or some creditor of a National Bank would have a right to investigate the affairs of the bank; and in case that the bank officers should refuse such inspection, then the stockholder or creditor might resort to the courts to permit such examination. In our opinion, this is the only sensible view that could be taken, in order to give force to the words "or are vested in the courts of justice."

Webster defines *visitorial* as follows: Belonging to a judicial visitor or superintendent.

"An arch deacon has visitorial powers in parishes." Ayliffe.

"The queen, however, still had over the church a visitorial power of vast and undefined extent." Macaulay.

The Century dictionary defines *visitorial* as follows: Belonging or pertaining to a judicial visitor or visitation.

See also case First National Bank of Youngstown v. Hughes, 6 Fed. Rep. 737.
Waite v. Dowley, 94 U. S. 527.

If the word visitorial is to be defined as above, then this statute has no relation whatever to the right of a stockholder in a National Bank to inspect the books and accounts of the same.

It is always well for a court in construing a statute or certain words contained in the statute, to ascertain what the history of the times was, and to find out what was the cause of the legislation if possible.

On June 3rd. 1864, when section 5241 was passed by Congress this Union was in the throes of a revolution which threatened the stability of our government. The doctrine of state rights which had been a fertile theme for discussion in the press, pulpit, rostrum and in the halls of Congress, and even in the courts of justice, was being tried by a clash of arms.

Ever since the formation of the government up to the firing on Fort Sumpter in the spring of 1861, the doctrine of state rights had been preached more or less throughout the whole Union, and the Southern states reserved to itself the right to finally determine this matter by a contest at arms.

In June, 1864, this government had been carrying

on this warfare for three years, and at this time it was sorely distressed to raise money sufficient to maintain its armies in the field and to carry on its other business. Specie payment had been suspended by the banks and the government had no gold or silver except such as were collected from duties on imports. Gold was at a premium. Treasury notes and bonds of the United States were at a discount, and an indebtness had been incurred which was appalling to the mind. Gold and silver were not circulating as a medium of exchange among the people; the only medium of circulation was the bonds and Treasury notes of the United States and the paper money issued by the state banks, which was of every hue and color and denomination. At this time it was estimated that the state banks had in circulation paper money of the face value of between $150,000,000 to $200,000,000, part of which was good, but most of it bad.

In order to provide for a uniform and safe bank currency and also to provide for a market for the United States bonds, which were necessary for the government to issue, John Sherman as senator from the state of Ohio, on the 26th day of January, 1863, introduced into the United States senate a bill which was afterwards known as the "National Bank law." The debate upon this bill in both houses of Congress was very spirited. Mr. Clark, a senator from New Hampshire, thought the proposed system might be improved by providing "that there shall be a visitation on the part of the states." He thought it would give confidence to the banks if the states "had the right to know how they stood," but this again was a sop to the state rights idea. Congress knew with the passage of this law and the tax that had been put upon state

bank circulation, which tax virtually prohibited the state banks from issuing any circulating medium, that there would be great discontent among the moneyed institutions in the North, and Congress anticipated that on account of this discontent some of the state legislatures might establish a system of espionage that would be detrimental to the conducting of these national institutions, and it was for this reason, and this reason only in our opinion, that congress provided that none of these associations shall be subject to any visitorial powers other than such as are authorized by Congress or are vested in the courts of justice. See Blaine's Twenty Years of Congress, Vol. I, Chap. 22.

Counsel for plaintiffs in error on pages 7 and 8 of his brief, says:

"In order to carry on these institutions (meaning National Banks) without creating disturbance in the financial world, it is absolutely necessary for the officers to guard with the highest faith the privacy of their clients' affairs. * * * To say that the privacy could be guarded by shareholders as well as directors is to shut one's eye to all human nature."

This argument is in the teeth of the statute of Utah and of every state of the union as far as we are informed.

If this bank had been organized under the laws of the state of Utah, section 329 of the Revised Statutes, which we have quoted above, would without question have permitted any stockholder to have an inspection of the books and accounts of the corporation, and any stockholder would have had this right under the common law.

Are there more secrets to be guarded in a national bank than in a state bank? Do not the statistics show

that there are more deposits and more money loaned in state banks and savings banks than from national banks? One would think from the closing pages of appellant's brief, that the directors of a national bank were high priests of finance, and that they had a sanctum sanctorum in which it would be sacriligious for anyone to take a peep except one of these high priests.

It does not seem reasonable or possible to us when Congress passed the national banking law, that it intended one person could obtain 51 percent of the capital stock, choose his own board of directors and then say to the balance of the stockholders "You cannot look at the books or accounts of this bank, for I control the majority of the stock and the directors are my puppets."

The object which this defendant in error is trying to attain, we think is a commendable one, and if the stockholders and directors of these institutions would not be so remiss in their duties, there would not be so many failures of National and State banks, and our penal institutions would not be encumbered with so many National bank presidents and cashiers.

What is there of such a private or secret nature in this bank that a stockholder should not be permitted to see the books and accounts? The directors do not own the books and accounts; they are only trustees holding the books and accounts for the benefit of the stockholders.

Counsel for plaintiffs in error states, that the lower court took much of its reasoning from the opinion rendered in the case of Tuttle v. Iron National Bank, 170 N. Y. Ct. of Appeals, p. 9. We think this statement is true.

Counsel further states, that the lower court went

further than did the New York court; but we call the attention of this court to the fact that when this case was tried, counsel for plaintiffs in error, by their pleadings and by their evidence, contended that we didn't have any right whatever to inspect the books and accounts of the Commercial National Bank, or to obtain a certified copy of these books and accounts.

The lower court had a right to exercise a reasonable discretion to what extent the defendant in error would be permitted to examine the books and accounts of the bank, and from the authorities which we have quoted in this brief, we claim that the lower court's discretion was reasonable and just, and with no showing to the contrary on part of the plaintiffs in error, this court will not permit the plaintiffs in error, for the first time, to find fault with that discretion.

The case of Easton v. Iowa, cited by plaintiffs in error, we do not think has any bearing upon the case at bar.

For the foregoing reasons we respectfully submit that the judgment of the Supreme Court of the State of Utah should be affirmed.

HIRAM H. HENDERSON,
HERBERT R. MACMILLAN.
Counsel for Defendant in Error.